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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

ERICKA HELLER,
also known as, ERICKA MCCANDLESS

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

Assignments of Error

1. The evidence is insufficient to sustain Ericka McCandless's convictions for Eluding and Hit and Run.

2. The State violated Ms. McCandless's 6th Amendment right of confrontation by eliciting testimony from Cpl. Thurman about what Justin Alderson told him about his alibi, and Thurman's verification that Alderson was truthful - and did in fact have an alibi.

3. The Hit and Run statute should not be applied where a person is hit by a pursuing police officer while that person is attempting to elude the officer.

4. The trial court erred by not merging Count 4, Obstructing a Law Enforcement Officer, with Count 2, Attempt to Elude.

5. The trial court erred by incorrectly calculating pre-sentence credit for time served and allocating the credit for time served between the felony and gross misdemeanor convictions.

Issues Pertaining to Assignments of Error

1. Was there sufficient evidence to prove beyond a reasonable doubt that Ericka McCandless was the driver of the F-350 that was

involved in a high-speed chase with Spokane Sheriff's deputies on November 2, 2016?

2. Did the State violate the Defendant's 6th Amendment rights by not calling Justin Alderson as a witness and, instead, presenting a summary of what Alderson told Cpl. Thurman about his alibi?

3. Should a person be charged with the separate crime of Hit and Run (Attended) when a collision is caused by a law enforcement officer while the person is attempting to elude the officer?

4. Should the charge of Obstructing a Law Enforcement Officer be merged into the charge of Attempting to Elude?

5. If the convictions are affirmed; should this case be remanded to the superior court to correctly calculate pre-sentence credit for time served and allocate the credit for time served between the felony and gross misdemeanor sentences?

II. STATEMENT OF THE CASE

On November 2, 2016 Erica McCandless (aka Heller) was arrested and taken into custody following a police chase in Spokane Valley. On that date, Deputy Sky Ortiz was on patrol working the night shift in Spokane Valley. He was wearing a black jumpsuit with "Spokane County

Sheriff's Department" badging on the front and back. He was driving a marked police vehicle with a light bar on the top and a siren. RP 53-54.

At around 8:40 pm he saw a Ford F-350 pickup fail to stop at a stop sign. He followed that vehicle, attempting to discern whether the driver might be impaired or committing other traffic violations. RP 55-56. The truck accelerated to approximately 60 mph in the 35 mph zone. RP 57. The deputy activated the emergency lights and siren and the truck accelerated from approximately 60 mph to 80 mph. RP 58. The deputy radioed the shift supervisor informing him of his location and direction of travel and that the truck he was following was attempting to elude. RP 60-61. The chase continued westbound on East Valleyway at around 60 mph. As the patrol vehicle and truck neared Sullivan the Sergeant ordered he deputy to terminate the pursuit. RP 61-62. Deputy Ortiz did so, turning off all emergency lights and siren, and he pulled over to the side of the road and stopped RP 61-62.

Dep. Ortiz also stated that, during the time he was in direct pursuit of the truck, he was "clearly able to make out two and possibly three" heads within the truck. RP 66.

Soon after that, Deputy Spencer Rassier radioed that he had the truck in sight at Adams and Valleyway and it was continuing to drive

recklessly. Deputy Ortiz drove to that area and paralleled the pursuit without lights or siren. RP 64-65.

Sergeant Harold Whapeles was on duty at the Spokane Valley Police Precinct at that time. RP 89. Sgt. Whaples drove his patrol car across Sprague and parked at the Subway parking lot across the street from the Valley Precinct. RP 91. He hid behind the shrubs next to the street and then deployed spike strips as the F-350 drove by. The spike strips were able to “pop” two tires on the truck. RP 92-93. The front driver’s side and rear passenger side tires were damaged. RP 94.

Sgt. Whapeles returned to his car and headed north on Pines to parallel the chase and be there if the chase headed north. He saw the chase turn around and head east on Sprague, so he returned to the Sprague and Pines intersection, arriving just after the conclusion of the chase. RP 95. There he saw the F-350 stopped with the front driver’s side tire off the rim. RP 95. He also saw a woman on the ground near the passenger side door. RP 96. He approached her and recognized her from past contacts as Amanda Milhouse. RP 97.

As stated, Deputy Spencer Rassier was on duty in the vicinity of Adams and Valleyway during the pursuit and he contacted the F-350 there. This was after the Sergeant at the Precinct had terminated the chase. RP 111. The pickup was going very fast and slid around the corner coming

toward him. The truck was in his lane of travel and Dep. Rassier had to brake aggressively and move out of the way. He activated his emergency lights and siren and reengaged the pursuit. RP 112. He followed the pickup as it turned northbound on Adams, then westbound on Sprague, and southbound on Evergreen, then westbound on Sprague. The truck was going around 80 miles per hour. RP 113-115.

Deputy Rassier was behind the pickup when Sgt. Whapeles deployed the spike strips near the Sprague and Pines intersection. RP 116. He followed the truck while it turned northbound on Herald, sliding into a curb. RP 117. When the truck hit the curb and stopped, Dep. Rassier attempted to conduct a post-PIP maneuver by striking the truck's right rear wheel with his patrol car, but the maneuver was unsuccessful, and the truck sped away. The front left side of the patrol car was damaged from patrol car's impact with the truck. RP 118 and RP 135-36.

Dep. Rassier continued the high-speed chase through the Valley, northbound on Herald to Mission, then south to Win-Co ending up eastbound on Sprague in the westbound lanes. RP 119. While the truck was on Mission it was going 85 miles per hour and during the pursuit Dep. Rassier could see tire pieces and sparks flying from the wheels damaged by the spike strips. RP 120-121.

On cross exam Dep. Rassier was asked to provide more details regarding the attempted post PIT maneuver. He testified that the truck attempted to slow down and turn right from Sprague onto Herald, but it lost control and came to a stop when it hit the curb. Dep Rassier then tried to make contact with the truck's right rear tire. He was then asked to explain how the truck could have accelerated into the patrol car while he was attempting to collide with the right rear tire of the truck. The deputy answered, "I don't recall exactly. I just remember a collision, and the only vehicle that was near me was her car -- or that white Ford." ... "I just saw it moving forward and then there was a collision." RP 140.

There were other deputies following the chase in their patrol cars. The Sheriff's Department helicopter, Air 1, was also in the air following and recording the chase until it ended. The helicopter's crew was alerted to the situation when Dep. Rassier made his initial call that he was following a reckless driver. RP 219. Deputy Clay Hilton testified that he was operating the FLIR (Forward Looking Infrared Radar) and regular camera and operating the radio to update the ground units. RP 219-20. The pilot was Deputy David Cummings and Deputy Knight was in the back monitoring the video and tracking the pursuit on a map. RP 223-224.

The voices inside the cockpit were recorded and Dep. Knight was heard to say that two people exited and ran from the F-350 at Sprague and

Pines; one when the truck was spinning and coming to a stop - and the other after the truck was stopped. RP 225.

On cross exam Dep. Knight was asked to review the portion of the video when the F-350 turned right from Sprague to Herald, hitting the curb, and when Dep. Rassier attempted to stop the truck with a PIT maneuver, striking the truck with the left front of the patrol car. Dep. Knight agreed he could not see any point after the truck accelerated away northbound where it had collided with the patrol car. RP 228-230.

The end of the pursuit on eastbound Sprague at the Sprague and Pines intersection was as dramatic as the chase.

Dep. Rassier was the first patrol car behind the F-350. Deputy Travis West was in the second position behind Dep. Rassier heading eastbound on Sprague until Corporal Jeff Thurman and his K9 partner, Laslo, joined the chase. Dep. West then took the third position. RP 124. RP 162. RP 185.

The pursuit ended when the truck lost control and crashed in the intersection at Sprague and Pines. Dep Rassier said that the F-350 “spun in --- around and then came to a stop.” RP 124. R’shelle Parkhurst, was working as a cashier at the Walgreen’s on the southeast corner of the intersection and saw how the chase ended. She stated, “And both of us

looked out the front windows and saw a white truck hit the middle median there and spin around backwards.” RP 148.

Dep. Rassier stated that when the F-350 stopped he saw a female immediately exit the passenger door and lay on the ground. He ran around to the driver’s side of the truck and saw a male and female running away from the direction of the truck. He then ran to assist Dep. Thurman who, “... was chasing another person that had ran from the vehicle.” He gave chase on foot until Laslo “made contact with the male,” and he then assisted in taking the male into custody.” RP 125-126.

Dep. Thurman testified that when he arrived at the intersection he saw a male running from the direction of the truck as the truck was still spinning. The suspect was paralleling the truck. When the truck finished its rotation and came to a stop, he saw the driver’s door open and a female exit the truck. RP 162-163. Dep. Thurman deployed Laslo, who acquired a “target lock” on the male and quickly put an end to his efforts to escape. RP 164. Dep. Thurman then approached the suspect who was on the ground with Laslo. The Deputy determined he was no longer a threat and requested Laslo to release him. Laslo complied and Dep. Thurman placed the suspect in cuffs, noting that his apprehension by Laslo resulted in just “a minor dog bite injury.” RP 165.

Dep. West pulled in behind Dep. Thurman's patrol car, and as he ran around the car he saw two people "going off in a 'V' direction northeast." RP 185. One was wearing a black jacket and had blond hair and was running directly north. He went after that person because "they had said" the driver was blond. RP 185-186. Then, after seeing Laslo chasing that suspect he turned his attention to the other, who "ended up being the female." He then put her in handcuffs and had her lay down on the ground. RP 186.

Deputy Branson Schmidt was riding in a two person car with Deputy McNall when Dep. Ortiz radioed that he was chasing the F-350. They tried to catch up to the pursuit but arrived at the final resting spot at Pines and Sprague shortly after it ended. Dep. Schmidt saw that another officer had the passenger of the truck "proned out" at gunpoint so he went to assist. That person was Amanda Milhouse.¹ RP 212-213.

Deputy Veronica Van Patton arrived on the scene and saw two suspects running away. However, she did not see any suspects exiting the truck. A couple of deputies and Laslo were targeting one of the suspects,

¹ Amanda Milhouse was the subject of a motion and order declaring her to be a material witness. The order for detention set the bond at \$20,000. CP 80-85. She was listed as a witness for the State in the List of State's Witnesses, CP 30, and the Criminal Trial Management Joint Report, CP 87-92. However, she was not called as a witness.

and Dep. West was attempting to apprehend the other, alone, so she went to assist Dep. West arrest the defendant, Ericka McCandless. After that, she placed Ms. McCandless in her patrol car and later transported her to jail. RP 207-208.

On cross examination she testified that a pack of Camel cigarettes was found inside the F-350. RP 209-210.²

In sum, the trial record shows that the driver of the F-350 was never positively identified during the chase by any of the deputies. When the chase ended in the Sprague and Sullivan intersection the witnesses saw the passenger, Amanda Millhouse, get out of the passenger door and lay on the ground, while Ericka McCandless and a blond male ran away from the truck. Therefore, one of the critical issues in the case was who was driving the truck. Was it Ericka McCandless or the blond male?

It turns out that the blond male is Justin Alderson. In the State's case, the Walgreens cashier, R'shelle Parkhurst, was called to identify Mr. Alderson as the person who bought some cigarettes around the time of the chase. RP 145. She stated that she was working at the front register of Walgreens in the evening of November 2, 2016. She had three customers

² The record is silent as to whether Justin Alderson had a pack of Camel cigarettes on him after he was arrested, nor were any cigarettes, Camels or otherwise, offered as evidence at trial.

in line at her register. One had caught her attention because he was acting “figety.” She noted he had blond hair, a ponytail, and was wearing a black jacket. She saw him enter the store and she “Flagged” him as a “transient” and kept her eye on him. She noted he was in the store for five to ten minutes and he left after purchasing a pack of Camel Turkish Royal cigarettes. CP 146-147. Shortly after that while she was ringing up one of the other persons in line she saw the white truck hit the median in the middle of the intersection and spin around. She said that just prior to that the customer at the register and she were “discussing the amount of sirens that were happening during that time of week... .” RP 148.

Later, a deputy came into the store to ask her if someone in a black coat came in to purchase Camel 99’s. She told him a man in a black coat had requested and purchased Camel Turkish Royals. She noted that people usually purchase Camel 99s or 99 Blues and it was unusual to have someone buy Camel Turkish Royals. RP 147-148. The deputy left and then returned later to ask her to have someone cover her register, so she could go outside and identify the gentleman. She went outside and saw the person who bought the cigarettes, positively identifying him after having him turn around so she could see his ponytail. RP 149.

However, on cross examination she admitted that the man she saw in the store had no distinctive or memorable characteristics, that she did

not really see his face, and that her identification was “triggered” by the ponytail. RP 150-154. Also, when she went outside, the deputy took her to the center median, and she was asked to look at the subject, who was standing across the dark street, in handcuffs, and surrounded by officers. RP 155-156. She also testified she was not asked to look at anyone else to see if maybe it was another person. RP 156. She also testified, that to her knowledge, law enforcement had not requested to look at any Walgreen security videos to verify who bought the cigarettes, or look at the receipt from the cigarette purchase, to pinpoint the time of the purchase. RP 154.

After the State rested (RP 231) the defense called Victoria Brazell as their first witness.³ Ms. Brazell testified that on November 2, 2016 her husband and she were having dinner at Denny’s on the northeast corner of the Sprague and Pines intersection when the car chase was happening. They were sitting in a booth next to a window that faced the intersection. She first saw a bunch of police cars driving “real fast” heading west on Sprague. Then a few minutes later she saw the truck, going east on

³ The defense filed a motion for Ms. Brazell to testify by phone. CP 75-79. Ms. Brazell was experiencing a high-risk pregnancy and her doctor had ordered her on fulltime bed rest. There was a discussion regarding due process and the State’s right to confrontation, but the prosecutor chose not to object to Ms. Brazell testifying telephonically. RP 75-83. The trial court then instructed the jury to consider the telephonic testimony the same as they would consider testimony of witnesses who are present in the courtroom. RP 233.

Sprague, speed through the intersection and crash into the median. After that she saw the driver get out of the truck and start running towards Denny's. She also saw the passenger get out and drop to the ground. She watched the driver run past Denny's, so she went over to the windows on the other side of the restaurant "but lost vision." She returned to their booth and saw two different people detained, one by a dog on the Denny's parking lot and another on the sidewalk. She was interviewed by a deputy inside Denny's and she told the deputy the driver "was a guy." She also testified that the deputy asked her if the driver was a male or female and she said she didn't know. RP 236-242.

The defense then called Deputy Justin Palmer, who was the deputy that interviewed Ms. Brazell. He reviewed his report and stated that Ms. Brazell told him that she saw the vehicle crash into the curb, that a male exited the driver's side and took off running, and he was detained by a police dog and other officers. He had her look outside and asked if the male who was being treated by medics was the male she observed, and she stated yes. That person was Justin Alderson. RP 246-247.

Again, Justin Alderson was never called to testify, despite being on the State's witness list, and his absence is not explained in the record. However, the State - in a roundabout way - and contrary to the court's ruling on Defendant's Motion in Limine, (CP 71) prohibiting the State

from introducing out-of-court statements to law enforcement unless the declarant first testifies at trial, and subject to cross examination. RP 17-18.

However, the State promptly violated the order in limine during its re-direct examination of Cpl. Thurman:

Q. Corporal Thurman, you contacted Justin Alderson, the man who ran away from the direction of the F350, and you had a conversation with him, correct?

A. That is correct.

Q. After the conversation you went to Walgreens. Did you go any other places, any other businesses other than Walgreens to try to confirm his alibi?

A. No, I did not.

Q. Okay. And why not?

A. Because I believed him and I had the --

MR. GRIFFIN: Objection, Your Honor.

...

BY MR. JOHNSON:

Q. And I'm not asking for a comment on credibility, but in terms of your investigation, were you satisfied that you had gone enough places to confirm the location of Justin Alderson during the time of this elude?

A. That is correct.

.... RP 179-180.

Prior to closing arguments, the jury was instructed on the four criminal charges set forth in the Information:

- Count 1. Possession of a Stolen Motor vehicle;
- Count 2. Attempting to Elude a Police Vehicle
With a Special Verdict form asking, “Was any person, other than Ericka McCandless or a pursuing officer, threatened with physical injury or harm by the actions of Ericka McCandless during her commission of the crime of attempting to elude a police vehicle”;
- Count 3. Failure to Remain at the Scene of an Accident - Attended Vehicle; and
- Count 4. Obstructing a Law Enforcement Officer.

During closing argument, the State argued that Ms. McCandless committed Count 3 when she failed to stop and exchange information with Dep. Rassier after their vehicles collided during his unsuccessful Post Pit Maneuver, and Count 4, when she obstructed and hindered and delayed the investigation by running from the truck after it crashed. RP 297-298. CP 143.

The jury returned a verdict of not guilty on Count 1 and Guilty on the remaining Counts. They answered Special Verdict form “Yes.” CP 125-129. RP 336-337.

Ms., McCandless was sentenced on April 18, 2017. The Court determined that the standard range for the felony eluding was 22-29

months plus 12 months and a day consecutive for the enhancement for a total of 34 - 41 months plus a day. The maximum sentence on the hit and run attended and obstructing gross misdemeanors was 364 days. CP 164.

The Court sentenced Ms. McCandless to the maximum of the range of the felony eluding, plus the enhancement for confinement of 41 months and a day. The Court then imposed 364-days for the gross misdemeanors to be served concurrently, but consecutive to the felony sentence, for a total of 53 months. The Court also specifically found that imposing a consecutive sentence on the gross misdemeanors did not constitute an exceptional sentence. RP 354-355.

The Court ordered 163 days credit for time served from her arrest on November 2, 2016 to April 18, 2017. The arithmetic is incorrect. There are 168 days from November 2 to April 18. Also, neither the Judgment and Sentence (CP 159-173) nor the Warrant of Commitment (CP 158) instructs how the credit for time served is to be allocated between the felony sentence and sentence for the gross misdemeanors.⁴

On July 6, 2017 the Court entered an agreed Order Clarifying Judgment & Sentence and Warrant of Commitment providing that the 53

⁴ In its oral findings, the court indicated that the credit for time served should be applied to the gross misdemeanors but the Judgment and Sentence and Warrant of Commitment do not reflect this. See RP 352.

month felony sentence would be served in the custody of the Department of Corrections and that the 364 day gross misdemeanor sentences would be served consecutively in the Spokane County Jail. The order is silent as to credit for time served. CP 195-196.

III. SUMMARY OF ARGUMENT

The convictions of Attempting to Elude and Hit and Run (Attended) cannot stand. The aggregated evidence at trial did not prove that Ericka McCandless was the driver of the Ford F-350 that led Sheriff's deputies on a protracted high-speed chase through Spokane Valley on November 2, 2018. There was no physical evidence or any testimony that she was the driver. There was also no tangible or forensic evidence from which to infer she was the driver. The deputies who were following the chase in a helicopter, and the others who arrived at the location where the pursuit ended all identified Justin Alderson as the driver and he was arrested. However, a Walgreens cashier who witnessed the crash identified Justin Alderson as the person who bought cigarettes at Walgreens, possibly while the chase was occurring. Her identification of Alderson is questionable because it occurred during a highly suggestive identification procedure. Her identification of Alderson as the person in the store was also directly contradicted by an eyewitness who saw the chase end, and

moments later identified Alderson as the person who exited the driver's door of the F 350 and attempted to escape.

Then, the State violated the court's order in limine and Defendant's right to confrontation by having the officer who arrested Alderson summarize what Alderson told him about his alibi and his verification of the alibi.

The conviction for Hit and Run (Attended) must be reversed because there was no evidence whatsoever that Ms. McCandless knew that a deputy collided with the truck during the pursuit.

The Obstructing charge should be merged with the Eluding charge because all of the elements of Obstructing are present in the Eluding statute.

The case must be remanded to the superior court to correct the arithmetic error it made calculating credit for time served in the Judgment and Sentence and Warrant of Commitment. Remand is also necessary to have the superior court to allocate the credit for time served between the felony and the gross misdemeanor sentences.

IV. ARGUMENT

1. The evidence is insufficient to sustain Ericka McCandless's convictions for Eluding and Hit and Run (Attended).

a. Standard of Review. The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, (1970). The same is true for sentencing enhancements. *State v. Recuenco*, 163 Wash.2d 428, 180 P.3d 1276 (2008).

The analytic formula for the beyond a reasonable doubt has been written in many hundreds of appellate courts at all levels. In *Jackson v. Virginia*, 443 U.S. 307, 317-18, 99 S.Ct. 2781, 2787 (1979), the Court stated:

[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.

The *Jackson* Court also recognized that “ ... that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm.” 443 U.S. at 314, 99 S.Ct. at 2786, Citing; *Thompson v. Louisville*, 362 U.S.199, 80 S.Ct. 624 (1960).

The Washington appellate courts have similarly formulated the beyond a reasonable doubt standard. Evidence is insufficient unless, when

viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wash. App. 789, 796, 137 P.3d 892 (2006). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *State v. DeVries*, 149 Wash.2d 842, 849, 72 P.3d 748 (2003). The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *DeVries* at 849.

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wash.2d 387, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wash. App. 589, 592, 123 P.3d 891 (2005).

The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence "substantial enough to allow the

[reviewing] court to conclude that the allegations are ‘highly probable.’”

In re A.V.D., 62 Wash.App. 562, 568, 815 P.2d 277 (1991).

The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra*

b. Analysis. The central factual issue in this case was who was driving the F-350. No one who testified identified Ericka McCandless as the driver. There was also no forensic or other tangible evidence from which to conclude she was the driver.

None of the occupants of the truck testified during trial. Justin Alderson, and Amanda Milhouse were identified as witnesses for the State. CP 30. Amanda Milhouse was even the subject of a material witness warrant. CP 85-86.⁵

Dep. Ortiz testified that at the outset of the chase he was “clearly able to make out two and possibly three” heads within the truck. RP 66.

Victoria Brazell had an unobstructed front row seat to the chase as it was heading westbound, and then when it came to a dramatic end just

⁵ The State indicates in its Motion in Limine that both Amanda Milhouse and Justin Alderson had felony convictions that would be admissible for impeachment purposes under ER 609(a). CP 33-34

outside the window of her booth at Denny's. When she was interviewed by Dep. Palmer minutes later she positively identified Justin Alderson as the person who exited the driver's door of the truck and tried to run away but was caught by Laslo. RP 246-247.

Justin Alderson was also identified as the driver by the deputies who arrived at scene at Pines and Sprague immediately after the chase ended. Deputy Knight who was in the back seat of Air One is heard to say that someone (Justin Alderson) exited the driver's side of the truck as it was coming to a stop. RP 225.

Walgreen's cashier, R'shelle Parkhurst was asked to come outside and identify Justin Alderson as the person who had purchased a pack of Camel cigarettes around the time of the chase. However, it was dark and she was looking across the street that was teeming with deputies. Then she was only asked if the person who was standing next to deputies in handcuffs was him. The deputies then made no effort to go back to the store to look at a cash register receipt or look at the security video to confirm the highly suggestive identification.

There is also nothing in the record about Justin Alderson having any cigarettes on him that were found in the search incident to his arrest or the search when he was booked into jail.

And, a pack of Camels was indeed found in the truck when it was searched. RP 209-210.

As stated, neither of the two people with first-hand knowledge of who was - or was not the driver, Amanda Milhouse and Justin Alderson, testified at the trial. The pattern criminal instruction, WPIC 5.20 recognizes that the State's failure to call a witness who is in the control of or peculiarly available to the State raises an inference that the witness's testimony would be unfavorable to the State's case. Amanda Milhouse clearly fits into this category. She was in the control of and peculiarly available to the State due to the material witness warrant the state procured to compel her to appear and testify. She was also, undisputedly, an occupant of the truck with actual knowledge who the driver was and what was happening during the chase.

This Court should therefore resolve whether Ms. McCandless was the truck's driver, which is central to the issue of whether Ms. McCandless's convictions for the driving offenses satisfied due process.

Secondly, to convict Ms. McCandless of Hit and Run (Attended) the State had to prove beyond a reasonable doubt that she knew she was involved in an accident when Dep. Rassier's patrol car hit her during his unsuccessful Post PIT maneuver. *State v. Martin*, 73 Wash.2d 616, 625, 440 P.2d 429 (1968).

A person acts with knowledge when: (1) (s)he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (2) (s)he has information which would lead a reasonable man in the same situation to believe that facts exist which are described by a statute defining the offense. *State v. Perebeynos*, 121 Wash.App. 189, 196, 87 P.3d 1216 (Div. 1, 2004), *Citing*, RCW 9A.08.010(1)(b).

Knowledge may be inferred from circumstantial evidence. If information is sufficient to cause a reasonable person in the same situation to believe that a fact exists, the trier of fact may infer that the respondent had knowledge. An appellate court will defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences. *Id* (cites omitted).

However, there is no evidence whatsoever, direct or circumstantial, that Ms. McCandless or the truck's driver were aware of Dep. Rassier's attempted Post PIT maneuver or any collision caused thereby. This was a high-speed chase and the F-350's driver was earnestly attempting to elude pursuing deputies. The truck attempted to slow down and turn right from Sprague to Herald, lost control, hit the curb, and stopped for an instant. Dep. Rassier attempted to hit the right rear tire of the truck to prevent it from moving, but the truck sped off and the chase continued in the same

manner as before. There was simply no evidence admitted at trial that would sustain any rational inference that Ms. McCandless, or any of the occupants of the truck, knew an accident or collision with Dep. Rassier's vehicle had occurred.

2. The State violated Ms. McCandless's 6th Amendment right of confrontation by eliciting testimony from Cpl. Thurman about what Justin Alderson said to him about his alibi, and Thurman's verification that Alderson was truthful - and did in fact have an alibi.

The Sixth Amendment to the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The confrontation clause applies to state courts through the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065 (1965), and guarantees a criminal defendant the opportunity to cross-examine adverse witnesses. *State v. Clark*, 139 Wash.2d 152 157-58, 985 P.2d 377 (1999), Citing, *Douglas v. Alabama*, 380 U.S. 415,418, 85 S.Ct. 1074 (1965).

The Defense provided detailed briefing on this issue, including a quote from *State v. Price*, 158 Wash.2d 630, 643, 146 P.3d 1183 (2006) (See CP at p.73):

The opportunity to cross-examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross examine if he so chooses. In this context, not only

must the declarant have been generally subject to cross-examination; he must also be subject to cross examination concerning the out-of-court declaration. The State's failure to adequately draw out testimony from the ... witness before admitting the ... hearsay puts the defendant in a constitutionally unacceptable Catch-22 of calling the [witness] for direct or waiving his confrontation rights.

It is plainly obvious that by asking Cpl. Thurman if he went to any other businesses other than Walgreens to confirm Alderson's alibi, and Cpl. Thurman's answer, "No I did not," and, "I believed him," clearly conveyed to the jury that; (1) Alderson told Cpl. Thurman he had an alibi, proving he did not participate in the crime, [i.e.: that he was at Walgreens while the chase was happening], (2) verification of his alibi would be found at Walgreens, and (3) Cpl. Thurman went to Walgreens and verified the truthfulness of Alderson's alibi.

Cpl. Thurman's testimony simply repeated what Alderson told him, just without using his actual words surrounded with quotes.

Therefore, Cpl. Thurman was repeating hearsay in violation of the evidence rules, Ms. McCandless's right of confrontation, and the Court's order barring this kind of testimony.

3. The Hit and Run statute should not be applied where a person is hit by a pursuing police officer while that person is attempting to elude the officer.

“When interpreting statutes, ‘we presume legislature did not intend absurd results,’ and thus avoid them where possible.” *State v. Weatherwax*, 188 Wash.2d 139, 148, 392 P.3d 1054 (2017); Citing, *State v. Eaton*, 168 Wash.2d 476, 480, 229 P.3d 704 (2010), (citing *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003). See also, *State v. Silva*, 106 Wash. App. 586, 592, 24 P.3d 477 (2001).

The driver of the truck was plainly “attempting to elude.” That is - trying to keep from being caught by the pursuing deputies. It defies any reasonable expectations that after the patrol car hit the truck, the driver of the F-350 would put the high-speed attempt to elude on hold; and stop for an interlude with Dep. Rassier to exchange information - before resuming the high-speed chase.

Further, RCW 46.52.020 “is aimed at protecting accident victims.” *Seattle v. Stokes*, 42 Wash. App. 498, 502, 712 P.2d 853 (1986). Its “underlying rationale” is to “facilitat[e] investigation of accidents and provid[e] immediate assistance to those injured.” *State v. Vela*, 100 Wash.2d 636, 641, 673 P.2d 185 (1983). These legislative goals are not served by applying the statute to a driver who is struck by a patrol car during a high-speed chase. The crime of Attempt to Elude a Pursuing

Police Vehicle adequately punishes fleeing motorists and protects the public, particularly with its 12-month enhancement if the eluding endangers someone besides the person attempting to elude and the pursuing officer.

And, the facilitation of accident investigation and provision of immediate assistance to those injured is not implicated where the accident occurs during an active police chase and the attempt to elude fails when the perpetrator is caught.

This Court's decision in *City of Spokane v. Carlson*, 96 Wash.App. 279, 979 P.2d 880 (Div. 3 1999) may also be helpful here. In this case a woman was stopped at a red light. When the light turned green, she was rear-ended by Carlson's taxi cab. Carlson then pulled alongside her, made a hand gesture she interpreted as a goodbye wave, and drove off. She wrote down the taxi's license number, then drove to work where she called the police and reported the accident. 96 Wash.App. at 281, 979 P.2d 883-84.

The court of appeals reviewed the Spokane Municipal Code hit and run ordinance, which is equivalent to RCW 46.52.020, and after reviewing Washington appellate cases interpreting RCW 46.52.020, held that, "[t]he burden of exchanging information falls on the motorist who caused the accident. SMC §16.52.020(3)":

Reading the ordinance then as a whole, the driver of the vehicle who was a cause of the accident resulting in damage to another vehicle must immediately stop his or her vehicle at the scene of the accident or as close thereto, or return to the accident scene, and exchange information and render any reasonable assistance necessary.

96 Wash.App at 285, 979 P.2d at 883.

The Court also noted:

We would unreasonably strain the language of SMC § 16.52.020 if we placed the burden of exchanging information on the driver of the attended and damaged vehicle. Such a reading is counter to the rationale of the “hit-and-run” ordinance. The driver of an attended and damaged vehicle may also be injured and therefore unable to exchange information. “Hit-and-run” laws require assistance for injured persons, as soon as possible. And they prevent people from avoiding liability for their acts by leaving the accident scene without identifying themselves. (cite omitted) The information exchange also facilitates the identification and investigation of those responsible for the accident. (cite omitted).

96 Wash.App at 286, 979 P.2d at 884.

So here, where Dep. Rassier’s patrol car was the one that was intentionally driven into the fleeing F-350, would it not unreasonably strain the language of RCW 46.52.020 to place the burden on the driver of the truck to stop and exchange information?

For these reasons, this court should find that, under the facts here, Ms. McCandless, who is charged with attempting to elude, should not also

be charged with hit and run (attended) for a collision that occurred during the pursuit.

4. The trial court erred by not merging Count 4, Obstructing a Law Enforcement Officer, with Count 2, Attempt to Elude.

Ericka McCandless was charged and convicted of Attempt to Elude, with a twelve-month enhancement for endangering others during the commission of the eluding offense. She was sentenced to a year less a day, consecutive to the felony Eluding sentence, for the Hit and Run and Obstructing gross misdemeanors.

The State argued that the Obstructing charge was based on Ms. McCandless's attempt to run away from the truck after the truck crashed and the chase ended at Sprague and Pines. RP 297-298 and CP 143.

The defense countered in closing that when the chase ended she ran just 40 feet from the truck, approached a vehicle, and then laid down; questioning whether her actions could be interpreted as willfully and purposely acting with knowledge she was hindering, delaying, or obstructing the many deputies at the scene. He also noted that multiple officers described her as being "compliant." RP 320.

Both the United States and Washington State Constitutions prohibit

multiple punishments for the same offense.⁶ Double jeopardy claims are reviewed de novo. *State v. Smith*, 177 Wash.2d 533,545, 303 P.3d 1047,1053 (2013). Under both the federal and state constitutions “within constitutional constraints” it is the Legislature that decides what conduct is criminal and determines the appropriate punishment. *Id.*, citing *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Accordingly, the court will review a double jeopardy claim to determine whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. *Calle*, 125 Wn.2d at 776.

Unless the legislature clearly states otherwise, when a defendant charged and convicted under more than one statute, double jeopardy applies if the offenses are (1) legally identical, and (2) based on the same act or transaction. *State v. Adel*, 136 Wn.2d 629, 632-33, 965 P.2d 1072 (1998); *see also Gocken*, 127 Wn.2d at 101 (*quoting Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52

⁶ Double jeopardy: The federal clause guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. The state double jeopardy clause also guarantees that “[n]o person shall be . . . twice put in jeopardy for the same offense.” Wash. Const. art. I, Sec. 9.

S.Ct.180 (1932)). See also, *United States v. Wahchumwah*, 710 F.3d

862, 868-69 (9th Cir. 2013):

An indictment is multiplicitous if it charges a single offense in multiple counts. Cite omitted).

In order to assess whether the statutory provisions under which Wahchumwah was charged are really one offense, we apply the test articulated in *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct.180 (1932). Under that test, “where the same act or transaction constitutes a violation of two distinct statutory provisions,” we ask “whether each provision requires proof of a fact which the other does not.” (Cite omitted). “If two different criminal statutory provisions ... punish the same offense or one is a lesser included offense of the other, then conviction under both is presumed to violate congressional intent.” (Cite omitted). “[T]he Court’s application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.” (Cites omitted).

The charges here are legally identical and multiplicitous.

Attempting to elude is committed when a driver “willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop.” RCW 46.61.024.

Under RCW 9A.76.020(1), “A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any

law enforcement officer in the discharge of his or her official powers or duties.”

All of the elements of Obstructing are subsumed in the definition of eluding. When a person, “willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop,” that person, “willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.”

Count 2, Eluding, and Count 4, Obstructing, fail the *Blockburger* test because all of the elements of the statute cited in Count 2 are found in Count 4 (along with the additional elements in Count 2 regarding fleeing from a patrol car). Or, stated another way, there are no statutory elements set forth in Count 4, Obstructing, that are not found in Count 2, Eluding.

Therefore, the Obstructing charge should be reversed and dismissed.

5. The trial court erred by miscalculating the credit for time served prior to sentencing and not designating how the credit for time served should be allocated between the Sentence for the felony and the consecutive sentence for the gross misdemeanors.

a. Number of days served prior to sentencing. Ms.

McCandless was booked into the Spokane County jail during the evening

of November 2, 2016. She remained in jail continuously until her sentencing on April 14, 2017.

Counting November 2, 2016, there are 168 days from that date to April 14, 2017.

At sentencing, the State informed the trial court that Ms. McCandless had served 163 days. RP 354. Ms. McCandless's attorney told the court she had served 168 days. RP 348. In its oral ruling, the court stated:

As it relates to Count III and Count IV, they may run concurrently to each other, with credit for time served. And the Court will recognize 168 days. That brings the 364 days down to 296 days (sic).⁷ That is then going to be the consecutive amount of time in addition to the 41 months and a day.

However, in the court's Judgment and Sentence, the court ordered that Ms. McCandless receive credit for time served of 163 days. This Court should therefore remand the case to the superior court to correct the arithmetic.

b. Allocation of credit for time served.

The judgment and sentence is silent how the pre-sentence credit for time served was to be allocated between the felony Eluding sentence and the consecutive sentence for the Hit and Run and Obstructing gross

⁷ 364 - 168 = 196.

misdemeanors. CP 164-65. This requires a remand to superior court to correct the judgment and sentence and allocate the credit for time served between these sentences. 13B Wash.Prac., Criminal Law § 4201 (2017-2018), *Citing, State v. Besio*, 80 Wash.App. 426, 432 n.1, 907 P.2d 1220, 1223 n.1 (1995).

The superior court on remand will then have the opportunity to review how Ms. McCandless has spent her time in the state institution, including her achievements and the positive changes she has made during her incarceration, and then, fashion the appropriate sentence to fit her current circumstances. This might even include a sentence that is suspended or deferred with conditions. *State v. Anderson*, 151 Wash.App. 396, 402, 212 P.3d 591, 594 (2009).

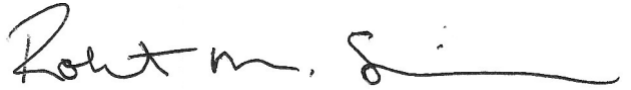
IV. CONCLUSION

For the reasons stated, this Court should reverse the convictions for Attempting to Elude (and the enhancement) and Hit and Run for lack of evidence and the State's violation Ms. McCandless's 6th Amendment right of confrontation. The Hit and Run charge should also be dismissed on grounds that the Hit and Run statute should not be applied as here, when the accident occurred with a pursuing patrol during an attempt to elude. In the alternative, if the Eluding conviction survives, this Court

should merge the Obstructing charge into the Eluding charge. This case should be remanded to the superior court to re-calculate and allocate the pre-sentence credit for time served.

DATED this 27th day of January, 2018.

Respectfully submitted,



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Attorney for Ericka Heller,
aka, Ericka McCandless

CERTIFICATE OF SERVICE

I, Robert M. Seines, do hereby certify under penalty of perjury that on January 29, 2017, I provided e-mail service by prior agreement (as indicated), a true and correct copy of the annexed Appellant's Opening Brief to:

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